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No. 82-916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD A. HERBERT,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the trial court correctly found that petitioner wilfully refused to comply with the grand jury's subpoena *duces tecum* for certain business records.

Whether the trial court correctly found that the petitioner's business records subpoenaed by the grand jury fell within the scope of the "required records" doctrine and therefore were not entitled to Fifth Amendment protection.

Whether the required records doctrine applies to grand jury proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINION BELOW

The petitioner was held in contempt of court by the Chief Judge of the Circuit Court of Cook County, Illinois, for refusing to comply with a subpoena *duces tecum* issued by a grand jury. The decision of the trial court was affirmed by the Illinois Appellate Court (No. 81-1798, July 20, 1982). See Petitioner's Appendix A. Petitioner's petition for leave to appeal to the Illinois Supreme Court was denied on October 5, 1982. See Petitioner's Appendix B.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the instant petition for a writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amendment V provides, in pertinent part, that:

> [No person] shall be compelled in a criminal case to be a witness against himself. . . .

STATEMENT OF FACTS

The facts relevant to the issues raised by petitioner are adequately set forth in the opinion of the court below, and need not be restated at length. Respondent directs this Court's attention to the argument portion of this Brief in Opposition, wherein the facts pertaining to the claim of error are discussed.

REASON FOR DENYING THE WRIT

BUSINESS RECORDS WHICH ARE REQUIRED TO BE MAINTAINED BY STATE AND FEDERAL LAW FALL WITHIN THE SCOPE OF THE "REQUIRED RECORDS" DOCTRINE THEREBY PRECLUDING THE ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION. FURTHERMORE, THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICATION OF THIS DOCTRINE.

The petitioner presents three bases for his claim that the target of a grand jury investigation cannot be deprived of his Fifth Amendment privilege against self-incrimination by operation of the "required records" doctrine. The respondent shall answer all three of these grounds in one argument as they are intertwined. In any event, the grounds raised by petitioner do not form a sufficient basis upon which to grant a writ of certiorari.

It is firmly established that the "required records" doctrine is a limitation on the Fifth Amendment privilege against self-incrimination. This Court, in *Shapiro v. United States*, 335 U.S. 1 (1947), held that records required to be kept, pursuant to a valid federal law or administrative regulation, are not privileged documents within the meaning of the Fifth Amendment.

In *Shapiro*, the Office of Price Administration subpoenaed the sales records of a defendant who was a private individual doing business as an unincorporated enterprise. This Court stated that his sales records were:

> Required to be maintained under an appropriate regulation, its relevance to the lawful purposes of the Administration, and the transaction which it recorded were ones in which the petitioner could lawfully engage solely by virtue of the license granted him under the statute.

335 U.S. at 35.

In *Grosso v. United States*, 390 U.S. 62 (1968), this Court established a three-pronged test to be employed in determining whether the "required records" doctrine precludes Fifth Amendment protection. The three factors are: (1) the purpose of the record-keeping requirement must be essentially regulatory; (2) the records must be of a kind customarily kept; and (3) the records themselves must have assumed public aspects. 390 U.S. at 67-68.

The petitioner concedes that his records are of the kind customarily kept by him. (Pet.'s Br. at 9) His dispute lies with the first and third prongs of the *Grosso* test.

The Illinois Medical Assistance Program is administered by the Department of Public Aid under Article V of the Illinois Public Aid Code. This program implements Title XIX of the Social Security Act (Medicaid) and is the statutory responsibility for the formulation of policy in conformance with federal and state requirements. *Medical Assistance Handbook*, Section I, Chapter 100, §101.

Of course, the rules promulgated by the department must be consistent with the minimum requirements of the federal statute. The federal records requirements of the Social Security Act are contained in 42 U.S.C. §1396a, which states, in part, that:

(a) A State plan for medical assistance must

* * *

(27) Provide for agreements with every person or institution providing services under the State plan, under which such person or institution agrees (A) to keep such records as are necessary fully to disclose the extent of the services provided to individuals receiving assistance under the State plan, and (b) to furnish the State agency with such information, regarding any payments claimed by such person or institution for providing services under the State plan, as the State agency may from time to time request. . . .

The Illinois Public Aid Code is contained in Chapter 23 of the Illinois Revised Statutes (1979). Section 12-13 specifically confers upon the Department of Public Aid the authority to promulgate rules and regulations to implement the other parts of the Code. Section 12-13 provides, in part, that:

§12-13 Rules and regulations. The Department shall make all rules and regulations and take such action as may be necessary or desirable for carrying out the provisions of this Code, to the end that its spirit and purpose may be achieved and the public aid programs administered efficiently throughout the State. . . .

Ill. Rev. Stat., 1979, ch. 23, § 12-13.

A similar provision authorizing the Department of Public Aid to promulgate rules is found at Section 5-5 of the Code. *Ill. Rev. Stat.*, 1979, ch. 23, § 5-5.

The Department has established two vehicles for ensuring that proper records are kept. It has promulgated general regulations and requires a provider agreement before funds are dispersed to a provider. That provision, which requires that records are to be kept by a partici-

pating provider in the program, is contained in Section I, Chapter 100, § 111(11), of the *Medical Assistance Handbook*, which provides, in part, that:

> Requirements for providers approved for participation include but are not limited to the following:
>
> * * *
>
> 11) Maintenance and retention of business and professional records sufficient to fully and accurately document the nature, scope and details of the health care provided.

This rule is mandated by Illinois statute. *Ill. Rev. Stat.*, 1979, ch. 23, § 5-5 (effective October 1, 1976), in part, provides that:

> All dispensers of medical services shall be required to maintain and retain business and professional records sufficient to fully and accurately document the nature, scope, details and receipt of the health care provided to persons eligible for medical assistance under this Code, in accordance with regulations promulgated by the Illinois Department. The rules and regulations shall require that proof of the receipt of prescription drugs, dentures, prosthetic devices and eyeglasses by eligible persons under this Section accompany each claim for reimbursement submitted by the dispenser of such medical services.

As a condition of participating in the Medicaid program, Dr. Richard Herbert agreed "to keep such records as are necessary to disclose fully the extent of services provided to individuals receiving assistance and reasonable information regarding payments claimed as the Department may from time to time request."

The petitioner, then, voluntary submitted himself to the regulation requirements without any expectation of

privacy in any records later requested by subpoena. Further, he could not have any expected privacy notwithstanding the agreement, since to participate, he was subject to the general records requirement of the Illinois Department of Public Aid (IDPA). Petitioner's assertion that he did not "waive" his Fifth Amendment protection is therefore erroneous because no Fifth Amendment protection ever attached to the records he was required to maintain. Each bill for services rendered to recipients under the Medicaid Program that respondent submitted to the IDPA contained a certification that had to be completed by the submitter of the bill. In part, the certification reads:

> I hereby agree to keep such records as are necessary to disclose fully the extent of services provided to individuals under TITLE XIX of the Social Security Act and to furnish information regarding any payments claimed as the State Agency may request.

Since petitioner could not have contemplated any Fifth Amendment privilege, there was no Fifth Amendment privilege to waive.

Furthermore, the court below correctly found that the purpose of the record keeping requirement was regulatory stating that the "purpose of the record keeping requirement here is to maintain the operation of the Medicaid program, not to catch criminals." (See Pet. Br. Appendix A at 7a) That court correctly turned aside the petitioner's argument, which he now presents to this Court, that the purpose for seeking the records was to institute criminal prosecutions not regulation of the Medicaid program. Thus, petitioner's reliance on *Haynes v. United States*, 390 U.S. 85 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Marchetti v. United States*, 390 U.S. 39 (1968), is simply without merit as those cases involved the requirement of reporting crimi-

nal activities. It cannot be said that the class of all doctors participating in the Illinois Medicaid program is a "selective group inherently suspect of criminal activities." *Marchetti*, 390 U.S. at 57.

Furthermore, the conclusion that the record keeping requirement is essentially regulatory is strengthened by the decisions in *In re Grand Jury Proceedings*, 601 F.2d 162 (5th Cir. 1979); *United States v. LaPage*, 441 F. Supp. 824 (N.D. N.Y. 1977); and *United States v. Cubeta*, 369 F.Supp. 242 (D. Conn. 1979). The record keeping requirement in each case was regulatory. *Cubeta* dealt with gun control, *LaPage* concerned health and disease control, and *In Re Grand Jury Proceedings* required records to be kept for customs regulation. Each case held that the required records could be used in criminal proceedings. Accordingly, the court below correctly concluded that the first prong of the *Grosso* test was satisfied.

As for the third prong of the *Grosso* test, the records herein have assumed a "public aspect" as they may be inspected by state officials in order to regulate the operation of the Medicaid system. *United States v. Cubeta*, 369 F.Supp. 242, 244 (D. Conn. 1974). Therefore, the court below was correct in its *Grosso* analysis.

As the records in the instant case fall within the scope of the "required records" doctrine, the Fifth Amendment privilege against self-incrimination is precluded and the petitioner must comply with the records subpoena as issued by the grand jury. Both state and federal regulations promulgated pursuant to valid statutes require the retention of records for all treatment rendered to patients under the Illinois Medicaid Program. Petitioner could not have contemplated that the business records were privileged or private because the statutes

require the providing of information in aid of a valid regulatory control over activities involving a public interest.

Finally, there is no conflict among the circuits in applying the "required records" doctrine. The petitioner's sole authority of *United States v. Plesons*, 560 F.2d 980 (8th Cir. 1977), is completely inapposite to the case at bar. The court there, in *dicta*, held that the doctor's notes concerning his patients may have been privileged. Those notes were not records made and kept pursuant to valid statutes and regulations. They were merely a doctor's personal notes concerning his patients. Respondent submits that the cases of *In re Grand Jury Proceedings*, *supra*, *LaPage*, *supra*, and *Cubeta*, *supra*, as discussed above, show uniformity among the circuits in applying the "required records" doctrine.

As the petitioner has failed to raise any important constitutional issue or present any grounds which would justify the consumption of this Court's valuable time, the instant petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, respondent respectfully prays that this Honorable Court deny the instant petition for Writ of Certiorari.

Respectfully submitted,

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